Thilagavathy a/p Alagan Muthiah v Meng Sing Glass Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-24 OF 1996
ABDUL KADIR SULAIMAN J
19 AUGUST 1997

Labour Law *— Industrial Court — Claim for back wages — Whether Industrial Court erred by not awarding back wages upon finding applicant wrongfully dismissed — Whether an award of back wages can be reduced if applicant delayed the hearing — Whether employee must mitigate damage — Industrial Relations Act 1967 ss 20 & 30 — Rules of the High Court 1980 O 53 r 1(2)*

The applicant was a draughtswoman cum estimator for the first respondent from 4 January 1993 to 15 March 1993, when she was dismissed. During this period, she was drawing a monthly salary of RM1,500. She remained unemployed until November 1993, when she took a job as a finish artist for a monthly salary of RM600. The Industrial Court ('the second respondent') heard her complaint on 22 September 1995, finishing on 6 January 1996. At the hearing, the second respondent found that the applicant had been wrongfully terminated and made an order for the first respondent to pay RM10,500 as compensation in lieu of reinstatement. All other claims were dismissed. The applicant applied to the High Court for an order of certiorari to quash the award and for mandamus to direct the second respondent to make the award of back wages calculated from the date of her dismissal to the last day of the hearing before the second respondent.

The first respondent argued that the award of back wages was dependent on the type of order the second respondent made, and since the second respondent had made an order for compensation in lieu of reinstatement, the award of back wages was discretionary. It argued that back wages, if awarded, could also be decreased as the applicant was responsible for the delay in hearing the complaint before the second respondent by filing her statement of case late. The first respondent also argued that the applicant was obligated to mitigate her damages, and thus her salary from her new job must be deducted from any award of back wages.

The applicant argued that the second respondent had erred in law by ignoring her claim for back wages. She further argued that she did not cause the delay in hearing the complaint, as she had not received the numerous court letters sent to her and was thus unaware of the hearing or of the requests for her to submit her statement of case until 5 January 1995. She further argued that an award of back wages should not be decreased by applying mitigation principles usually applied in contract and tort because her complaint was made under s 20(1) of the Industrial Relations Act ('the Act'), which is a reinstatement proceeding. She argued that requiring the applicant to

mitigate her damages by finding a new job and yet progressing her claim for reinstatement were contradictory and would lead to unfairness and hardship.

Held, granting certiorari and quashing the award:

(1) The second respondent clearly erred by not considering the applicant's claim for back wages and thus the High Court must intervene and quash the award. Under normal circumstances, the case would be referred back to the second respondent to calculate the amount of back wages due. However, given the delay in this case, it would defeat the purpose of the Act to refer the matter back and hence the High Court had the discretion to make the determination (see pp 742H–I and 743A); *SK Verma v Industrial Tribunal-cum-Labour Court, New Delhi* 1981 AIR 422, *Dhandapani* v *Salem Co-operative Wholesales Stores Ltd* [1959] 1 LLJ 635 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(2) The issue of back wages was a separate matter altogether from the award of compensation in lieu of reinstatement. Back wages, although a related matter, is not dependent on the type of order to be made upon the finding of dismissal without just cause or excuse. Generally, once it is determined that a workman has been unjustly dismissed, for his absence from the job from the time of dismissal to the time of reinstatement or the time of the order for compensation in lieu thereof, he must be paid wages in full as though he was working for the employer during the period (see pp 741I and 742A); *Dhandapani v Salem Co-operative Wholesales Stores Ltd* [1959] 1 LLJ 635 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 followed.

(3) The wrongfully dismissed workman must be paid full wages for the duration of his absence from work unless cogent reasons are shown why he should be denied the full amount or that the quantum be scaled down (see pp 742C–G and 747E–F); *SK Verma v Industrial Tribunal-cum-Labour Court* 1981 AIR 422 followed.

(4) Whether the applicant was responsible for the delay in hearing her matter is a relevant consideration in the assessment of the amount of back wages to be paid to her. The facts did not support the first respondent's contention that the applicant was responsible for the delay and in fact showed that she was not at fault (see p 743D–E).

(5) The mitigation principle does not apply to statutory claims made under the Act. The application in the present case was one for reinstatement, hence the applicant was claiming that her dismissal was wrongful and she was entitled to an order that would compel the first respondent to recognize the contract as still existing. In contract cases, the common law accepts the position that the contract has been terminated by the dismissal, whether the dismissal is wrongful or not. It would thus be inconsistent for the

applicant, while still making her claim, to go off and seek other employment as to do so might suggest that she had abandoned her reinstatement claim and it would be open to the first respondent to argue the dispute no longer existed (see pp 746I and 747A–B).

(6) Given that the mitigation principle was inapplicable, the fact that the applicant was employed elsewhere was not a cogent reason to decrease the quantum of back wages as it would be inequitable to require her to offset that amount which was earned out of sheer necessity. Since she was not responsible for the delay in hearing the matter, she was entitled to full back wages from 15 March 1993, the date of her dismissal, to 23 January 1996, the date the award was handed down by the second respondent in relation to the status of her dismissal (see pp 747F–I and 748A).

[*Editorial Note*: The first respondent has filed an appeal to the Court of Appeal vide Civil Appeal No W–04–65–97.]

[Bahasa Malaysia summary

Pemohon merupakan seorang pelukis pelan merangkap jurunilai untuk penentang pertama dari tarikh 4 Januari 1993 hingga 15 Mac 1993, apabila beliau telah dipecat. Semasa tempoh ini, gaji bulanan beliau adalah RM1,500. Beliau mengganggur sehingga bulan November 1993, apabila beliau bekerja sebagai seorang pelukis dengan gaji bulanan sebanyak RM600. Mahkamah Perusahaan ('penentang kedua') telah mendengar aduannya pada 22 September 1995, yang berakhir pada 6 Januari 1996. Di pembicaraan, penentang kedua mendapati bahawa pemohon telah diberhentikan dengan salahnya dan membuat satu perintah untuk penentang pertama supaya membayar RM10,500 sebagai pampasan sebagai ganti pengembalian kedudukan jawatan. Kesemua tuntutan yang lain telah ditolak. Pemohon memohon kepada Mahkamah Tinggi untuk satu perintah certiorari bagi membatalkan award dan untuk mandamus bagi mengarahkan penentang kedua membuat award upah kebelakangan yang dikira dari tarikh pemberhentiannya sehingga hari terakhir pembicaraan di hadapan penentang kedua.

Penentang pertama menghujahkan bahawa award upah kebelakangan bergantung kepada jenis perintah yang dibuat oleh penentang kedua, dan oleh kerana penentang kedua telah membuat perintah untuk pampasan sebagai ganti pengembalian kedudukan jawatan, award upah kebelakangan adalah berdasarkan budi bicara. Ia menghujahkan bahawa jika upah kebelakangan diawardkan, ia juga boleh dikurangkan kerana pemohon bertanggungjawab atas kelewatan dalam mendengar aduan di hadapan penentang kedua dengan memfailkan pernyataan kes yang lewat. Penentang pertama juga menghujahkan bahawa pemohon harus mengurangkan kerugiannya, dan justeru itu gajinya dari pekerjaan baru mesti ditolak dari sebarang award upah kebelakangan.

Pemohon berhujah bahawa penentang kedua telah melakukan kesilapan di sisi undang-undang dengan mengabaikan tuntutannya untuk upah kebelakangan. Dia selanjutnya menghujahkan bahawa dia tidak menyebabkan kelewatan dalam mendengar aduan, kerana dia tidak menerima surat mahkamah yang dihantar kepadanya dan justeru itu tidak sedar tentang pembicaraan atau permintaan supaya menyerahkan pernyataan kes sehingga 5 Januari 1995. Dia seterusnya berhujah bahawa suatu award upah kebelakangan tidak patut dikurangkan dengan memakai prinsip-prinsip peringanan yang biasanya terpakai dalam kontrak dan tort kerana aduannya telah dibuat di bawah s 20(1) Akta Perhubungan Perindustrian ('Akta tersebut'), yang merupakan suatu prosiding pengembalian kedudukan jawatan. Dia menghujahkan bahawa menghendaki pemohon mengurangkan kerugian dengan mencari pekerjaan baru serta mempercepatkan tuntutannya untuk pengembalian kedudukan jawatan adalah bercanggahan dan akan mengakibatkan ketidakadilan dan kesukaran.

Diputuskan, membenarkan certiorari dan membatalkan award:

(1) Penentang kedua jelas terkhilaf dengan tidak mempertimbangkan tuntutan pemohon untuk upah kebelakangan dan justeru itu Mahkamah Tinggi mesti masuk campur dan membatalkan award. Dalam keadaan-keadaan biasa, kes akan dihantar semula kepada penentang kedua untuk menghitung amaun upah kebelakangan yang harus dibayar. Namun demikian, memandangkan kelewatan dalam kes ini, ia akan menewaskan tujuan Akta tersebut untuk menghantar semula perkara itu dan maka Mahkamah Tinggi mempunyai budi bicara untuk membuat penentuan (lihat ms 742H–I dan 743A); *SK Verma v Industrial Tribunal-cum-Labour Court, New Delhi* 1981 AIR 422, *Dhandapani v Salem Co-operative Wholesales Stores Ltd* [1959] 1 LLJ 635 dan *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(2) Isu tentang upah kebelakangan adalah perkara yang berasingan daripada award pampasan sebagai ganti pengembalian kedudukan jawatan. Walaupun upah kebelakangan adalah perkara yang berkaitan, ia tidak bergantung kepada jenis perintah yang dibuat sekiranya didapati pemberhentian tanpa sebab atau alasan yang munasabah. Pada amnya, sebaik sahaja ia dipastikan bahawa seseorang pekerja telah diberhentikan dengan tidak adilnya, untuk ketidakhadiran dari kerja dari masa pemberhentian sehingga masa pengembalian kedudukan jawatan atau masa perintah untuk pampasan sebagai gantinya, dia mesti dibayar upah penuh seolah-olah dia telah bekerja untuk majikan semasa jangkamasa itu (lihat ms 741I dan 742A); *Dhandapani v Salem Co-operative Wholesales Stores Ltd* [1959] 1 LLJ 635 dan *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 diikut.

(3) Pekerja yang diberhentikan dengan salahnya mestilah dibayar upah sepenuhnya untuk tempoh ketidakhadiran di tempat kerja melainkan alasan yang meyakinkan ditunjukkan mengapa dia

tidak patut menerima jumlah penuh atau bahawa kuantum harus dikurangkan (lihat ms 742C–G dan 747E–F); *SK Verma v Industrial Tribunal-cum-Labour Court* 1981 AIR 422 diikut.

(4) Sama ada pemohon adalah bertanggungjawab atas kelewatan dalam mendengar perkara itu adalah pertimbangan yang relevan dalam menaksir amaun upah kebelakangan yang harus dibayar kepadanya. Fakta-fakta tidak menyokong hujah penentang pertama bahawa pemohon adalah bertanggungjawab atas kelewatan dan pada hakikatnya menunjukkan dia tidak patut dipersalahkan (lihat ms 743D–E).

(5) Prinsip-prinsip peringanan tidak terpakai kepada tuntutan statutori yang dibuat di bawah Akta tersebut. Permohonan dalam kes ini merupakan permohonan untuk pengembalian kedudukan jawatan, justeru itu pemohon menuntut bahawa pemberhentiannya adalah salah dan dia berhak kepada suatu perintah yang akan mewajibkan penentang pertama mengakui bahawa kontrak masih wujud. Dalam kes-kes kontrak, common law menerima kedudukan bahawa kontrak telah ditamatkan oleh pemberhentian, sama ada pemberhentian adalah salah atau tidak. Maka ia tidak tekal untuk pemohon mencari pekerjaan lain sewaktu masih membuat tuntutan kerana perbuatan demikian mungkin mencadangkan bahawa dia telah meninggalkan tuntutan pengembalian kedudukan jawatan dan ianya terbuka kepada penentang pertama untuk menghujahkan pertikaian tidak lagi wujud (lihat ms 746I dan 747A–B).

(6) Memandangkan prinsip-prinsip peringanan adalah tidak terpakai, fakta bahawa pemohon digaji di tempat lain bukanlah alasan yang meyakinkan bagi mengurangkan kuantum upah kebelakangan kerana ia tidak saksama untuk menghendakinya menolak amaun itu yang didapati akibat keperluan. Oleh kerana dia tidak bertanggungjawab atas kelewatan dalam mendengar perkara itu, dia berhak mendapatkan upah kebelakangan penuh dari tarikh 15 Mac 1993, tarikh pemberhentian, hingga 23 Januari 1996, tarikh award dibuat oleh penentang kedua berhubung dengan keadaan pemberhentiannya (lihat ms 747F–I dan 748A).]

Notes

For cases on the Industrial Court, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 919–993.

Cases referred to

Dhandapani v Salem Co-operative Wholesales Stores Ltd [1959] 1 LLJ 635 (folld)

Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304 (refd)

Holiday Inn, Kuching v Lee Chai Siok Elizabeth [1992] 1 MLJ 230 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Hotel Jaya Puri Bhd v National Union of Hotel Bar & Restaurant Workers & Anor [1980] 1 MLJ 109 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (folld)
SK Verma v Industrial Tribunal-cum-Labour Court, New Delhi 1981 AIR 422 (folld)

Legislation referred to

Industrial Relations Act 1967 ss 20, 29(d), (g), 30
Rules of the High Court 1980 O 53 r 1(2)

D Kalaimany (*Kalai & Partners*) for the applicant.
Dennis Appaduray (*Sidek, Teoh, Wong & Dennis*) for the first respondent.

Cur Adv Vult

Abdul Kadir Sulaiman J: Upon a reference by the Minister of the representations of the applicant under s 20 of the Industrial Relations Act 1967 ('the Act'), the second respondent, the Industrial Court, heard the dispute and subsequently handed down award No 29/96 in favour of the applicant. At p 10 of the award the learned chairman said:

> It is an admitted fact that the claimant (the applicant) submitted her claim late and the hearing could only be completed at the beginning of January 1996 and because of this and bearing in mind equity and good conscience, a sum of RM10,500 would be considered fair and just to be compensated to the claimant by the company as the court finds that her termination was without just cause or excuse and she was unemployed from April 1993 to October 1993, a total of approximately seven months.
>
> *All other claims by the claimant, if any, are hereby dismissed* (Emphasis added.)

By this application, the applicant applies to this court for an order of certiorari to quash the said award and also for an order of mandamus to direct the second respondent to make the award of back wages to the applicant to be calculated from the date of her dismissal to the last day of the hearing before the second respondent. The effect of the two prayers construed together in the light of the passage quoted above in relation to the award showed that the applicant was not satisfied with the award which did not make provisions for back wages due to her as a consequence of the dismissal being held to be without any just cause and excuse. This is supported by relief (i) and (ii) contained in the statement made pursuant to O 53 r 1(2) of the Rules of the High Court 1980 filed herein. The applicant was employed by the first respondent as a draughtswoman cum estimator on 4 January 1993 and was dismissed from her employment on 15 March 1993, after a period of two months and 11 days. The hearing before the second respondent on a dispute over her dismissal commenced only on 22 September 1995 and was completed on 6 January 1996. The award was handed down only on 23 January 1996. At the time of the dismissal, the applicant was drawing a monthly salary of RM1,500 per month.

A At the outset, it must be stressed that this application of the applicant is not by way of an appeal against the decision of the second respondent but for a remedy under public law of judicial review. The applicant will succeed in this application only if she can show that, in the making of the said award, the second respondent has committed error of law within what is commonly known as the *Anisminic* or the *Wednesbury* principle.

B It is clear from the above-quoted passage in the award of the learned chairman of the Industrial Court that having found that the applicant was dismissed by the first respondent without just cause and excuse, he did not make any order of reinstatement which is the primary remedy in respect of such a representation. Instead, he awarded compensation in lieu of C reinstatement in the sum of RM10,500 which is within his discretion to make as so held in the Federal Court case of *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304. The question of the amount of compensation in lieu to be awarded is of course very much a matter of the discretion which the Industrial Court is fully empowered to determine under s 30 of the Act: D see *Hotel Jaya Puri Bhd v National Union of Hotel Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109. In any event, that is not an issue in the present application of the applicant. What is in issue is the failure of the Industrial Court to make provisions for back wages to be paid to the applicant having held that the applicant was dismissed by the first respondent without just cause or excuse. This is borne by the fact that all other claims by the E applicant, which necessarily includes the claim for back wages, were dismissed by the learned chairman.

Learned counsel for the first respondent submitted that as the Industrial Court declined to order reinstatement in this case but instead ordered compensation in lieu of reinstatement, the award of back wages F must be entirely within the discretion of the court to make or refuse. I do think I can agree with that proposition because the issue of reinstatement relates to the fact of dismissal without just cause or excuse. The primary remedy under s 20 of the Act is reinstatement of the wrongfully dismissed workman to his former job. For that reason, a workman exercising his right under the Act cannot succeed in his claim for compensation in lieu of G reinstatement (but could succeed if he claims for reinstatement to his former employment): see *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230. However, circumstances in a given case may not move the court to order reinstatement even though a workman was dismissed without just cause or excuse: see *R Rama Chandran v The Industrial Court* H *of Malaysia & Anor* [1997] 1 MLJ 145 (FC). Because of the powers given by s 30 of the Act — in particular, sub-s (6) thereof — the Industrial Court could instead make an order of compensation in lieu. But, whether or not the court makes the award, ie by an order of reinstatement or an order for compensation in lieu, the issue of back wages is a separate matter altogether. It is an issue, though related to the fact of dismissal without just cause or I excuse, that is not dependent on the type of order to be made upon the finding of dismissal without just cause or excuse. Once it is determined that a workman has been dismissed without just cause or excuse, generally for his absence from the place of employment from the time of dismissal

to the time of reinstatement or the time of the order for compensation in lieu thereof, he must be paid wages in full as though he was working for the employer during the period. It was not his fault that he was away from work during the period. It was because of the wrongful act of the employer in dismissing him without any just cause or excuse. In *Dhandapani v Salem Co-operative Wholesales Stores Ltd* [1959] 1 LLJ 635, the Madras High Court held that as the termination in that case was wrongful, the employee must be deemed to have continued in service without a break and that he would be entitled to the salary from the date of dismissal till reinstatement. I would say, generally, the workman must be paid wages for the duration of his absence from work because, under exceptional circumstances, the Industrial Court has the discretion to reduce the amount of back wages of a workman in the sense that his back wages will not be ordered to be paid in full for the duration of the period. In *SK Verma v Industrial Tribunal-cum-Labour Court, New Delhi* 1981 AIR 422 at p 424, Chinnappa Reddy J said:

> Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-a-vis the employer and workmen to direct *reinstatement with full back wages*. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. *The court may deny the relief of reinstatement where reinstatement is impossible* because the industry has closed down. *The court may deny the relief of award of full back wages* where that would place an impossible burden on the employer. In such and other exceptional cases, the court may mould the relief but, *ordinarily the relief to be awarded must be reinstatement with full back wages*. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted. (Emphasis added.)

The learned chairman, having held that the dismissal of the applicant was without just cause and excuse but failed to determine the back wages due to be paid by the first respondent, has clearly fallen into error of law which necessitates the intervention of the High Court in this proceedings by the applicant, because it is a relevant consideration which he cannot ignore. In the circumstances, that part of the award of the second respondent dismissing the claim on back wages is clearly erroneous and is hereby quashed. The applicant, therefore, succeeds in her application for certiorari in that respect and consequently also succeeds in her second prayer for a mandamus directing the second respondent to determine the amount of back wages to be paid by the first respondent to the applicant on account of her wrongful dismissal. Under normal circumstances, this matter would be referred back to the second respondent with the said direction. But to

do so in this case would defeat the purpose of the Act to see that the dispute be disposed off expeditiously. It is four years now since the dispute began. It would not be in the interest of anyone to have the matter referred back to the second respondent simply for it to work out the amount due. According to *R Rama Chandran v The Industrial Court of Malaysia & Anor*, the court is competent to do so on behalf of the Industrial Court. At p 198, Edgar Joseph Jr FCJ said:

> I have carefully considered the question whether this court should remit the case to the Industrial Court to determine the monetary compensation to be paid by the Employer to the Employee which will, in essence, involve a simple arithmetical calculation but will also lead to unnecessary prolongation of proceedings involving inevitable delay and increased expenditure, in what has already been a long drawn out litigation with consequent hardship to the Employee who is now getting on in age.

In the circumstances, this court will take upon itself to assess the amount of back wages due to the applicant. According to the finding of the learned chairman, the applicant submitted her claim (statement of case) late resulting in the late completion of the hearing. This is relevant in determining the amount of back wages due to be paid to the applicant consequent upon the wrongful dismissal of her by the first respondent. It is relevant in the context of whether in the circumstances of this factual situation the amount of her back wages ought to be reduced. If it is established that it was through the fault of the applicant that the proceedings in the Industrial Court were delayed, then she would not be entitled to full back wages. Otherwise, the amount would be calculated based on the period from the date of her dismissal to the date the award of compensation in lieu of reinstatement was made by the second respondent.

In the present case, the hearing relating to her representations under s 20(1) of the Act was completed only about three years after her dismissal. Learned counsel for the first respondent says that this delay was clearly attributable to the applicant's conduct in the late submission of her statement of case. Learned counsel for the applicant, on the other hand, did not agree to the suggestion that the applicant was at fault. He drew attention to s 29(d) and (g) of the Act wherein the Industrial Court could have proceeded to hear and determine the matter before it as is necessary or expedient for the expeditious determination of the matter, notwithstanding the failure of the applicant to submit her statement of case. He contended that the applicant should not be blamed for the delay on account of the failure of the court to invoke its powers under the said subsection to hear the dispute much earlier. If there is going to be a delay in the hearing, the court must necessarily use its power under the said subsections, he says. Otherwise, the court shall be deemed to have condoned the delay and such delay cannot be a factor to be taken into consideration in calculating back wages. In the circumstances, learned counsel contended that the applicant should be awarded full back wages up to the time of the completion of the proceedings before the Industrial Court.

For the proper appraisal of the matter in issue, let me turn to the facts leading to this delay in the disposal of the matter before the Industrial

Court. The representations of the applicant under s 20 of the Act were referred to the second respondent by the Minister on 7 May 1994. Form H dated 31 May 1994 was issued to the applicant at 51-3, *Jalan Tun Sambanthan*, off Jalan Brickfields, Kuala Lumpur, calling for the statement of case to be submitted to the second respondent within seven days from the date of service of the said Form H. The matter was placed for mention before the court on 13 June 1994. On the day of the mention, the learned chairman was away and the applicant was absent and the case was placed for the next mention date on 20 June 1994. Counsel for the first respondent was asked to inform the applicant accordingly. The solicitors for the first respondent sent a letter dated 17 June 1994 to the applicant at the same address as in Form H issued by the Industrial Court. On 20 June 1994, the applicant again was not present in court for the mention. On that day, the learned chairman directed that the statement of case by the applicant be filed by 20 July 1994 and the statement in reply by the first respondent by 20 August 1994 and he put the case for mention again to 22 August 1994. By another Form H dated 22 June 1994, the applicant was asked by the court to submit her statement of case by 20 July 1994. This time the said Form was addressed to *Cik Thilagavathy a/p Alagan Muthiah, Kuala Lumpur*. By Form G of the same date, the court gave notice of the hearing of the case to both parties on 22 August 1994. The address of the applicant this time is the same address as in the first Form H issued to her. As no statement of case was forthcoming from the applicant up to then, the case was adjourned to 24 October 1994 for mention again. The court this time issued Form F dated 22 September 1994 to both parties informing of the date of mention. This time the address of the applicant was stated as No 51-3, *Jalan Thambipillay*, Kuala Lumpur. By a letter dated 30 September 1994, the solicitors for the first respondent informed the first respondent that the court's earlier letters to the applicant were returned undelivered. It is clear therefore, that up to this point of time, the applicant was not even aware that she was required to submit her statement of case, let alone attend court either for mention or for hearing of her dispute with the first respondent as referred by the Minister to the Industrial Court. On 24 October 1994, the court adjourned the matter to 5 December 1994 for another mention of the case. By a letter dated 10 December 1994, the first respondent was informed by its solicitors that the court had again fixed the case for mention on 16 January 1994 to enable the claimant to file her statement of case. The first respondent was also told by the solicitors in the letter that the court had just received the applicant's new address and was writing to her.

Indeed, on 14 December 1994, the applicant received Form H of 12 December 1994 from the Industrial Court calling for her statement of case to be submitted by *5 January 1995* addressed to her solicitors M/s Kalai & Partners. By a letter dated 5 January 1995, the solicitors asked the court for extension of time to file the applicant's statement of case which was accordingly filed on 13 January 1995. In the meantime, the case was fixed for mention on 16 January 1995. By a notice in Form J dated 26 January 1995, the first respondent was asked to submit

a statement in reply by *16 February 1995* and by Form G of 26 January 1995, the matter was fixed by the court for hearing on *22 September 1995*. On the last day given for the submission of the statement of reply, the solicitors for the first respondent wrote in to the court asking for an extension of time until 28 February 1995 to file the same on the ground that the client had just returned from the Chinese New Year holiday. In any event, the statement in reply was filed on behalf of the first respondent on 21 February 1995.

On 22 September 1995, the hearing commenced as scheduled. It was continued on 23, 27 and 28 September 1995 and finally completed on 6 January 1996. Therefore, from the chronological events mentioned above, it is clear that it was through no fault of the applicant that the hearing of the reference — though referred by the Minister to the Industrial Court on 7 May 1994 — was only commenced before the learned chairman on 22 September 1995. The earlier correspondence to the applicant prior to 12 December 1994 was undelivered to her. In the circumstances, it is not correct to say that the applicant was at fault in causing the delay in the disposal of matter before the Industrial Court.

Next is the finding of the Industrial Court based on the evidence before it that during the period from the date of dismissal to the date of the completion of the hearing, the applicant was employed elsewhere as a finish artist at a salary of RM600 per month. On account of her dismissal by the first respondent, she was unemployed only for a total period of approximately seven months. This is what the learned chairman says at p 8 of the award:

> There was evidence from the claimant that the companies doing aluminium works were few in the country and because of this, it was difficult for her to get employment and this difficulty was made worse when her name had been smeared by the company. Although she managed to get employment around November 1993, she was only employed as a finish artist at a salary of RM600 per month.

The issue now is whether that period of time she was employed pending the decision of the court relating to her dismissal by the first respondent be deducted in determining back wages to be paid by the first respondent. Alternatively, whether the amount of wages earned elsewhere during the period should be deducted from full back wages to be paid to her. The answer to this question revolves round the principle of mitigation of damages in the claim for damages in contract or tort against a person in breach or a wrongdoer. It was the contention of learned counsel for the applicant that this principle of mitigation would not apply in industrial dispute cases. He gave various reasons in support of his contention. The proceedings before the Industrial Court on a complaint under s 20(1) of the Act basically is a reinstatement proceedings. Only in certain circumstances where the court finds that reinstatement is not appropriate that the award would be compensation in lieu of reinstatement. An order for reinstatement is an order compelling the employer to specifically perform his contract of employment with his workman treating as if the contract was never broken but continuing. Therefore, it is inconsistent for

a workman to seek reinstatement on the one hand and be required to seek employment elsewhere by way of mitigation on the other. To require him to seek employment elsewhere while the claim is pending would tantamount to him abandoning his claim for reinstatement. A contract of service is a personal service and it cannot exist in two different forms at the same time. The workman could be considered to have waived his dispute with the employer by having to seek his employment elsewhere as it could be argued that a trade dispute does not exist as there would be no dispute which will be connected with employment or non-employment or terms of employment or conditions of work. For a workman who is a member of a union, he will not have the right to be represented by his union if he seeks employment in an industry different from that which the union represents, or else, to avoid losing his membership with the union the workman could only seek employment in an industry which the union represents. The workman is morally bound to inform his prospective employer that he has just been terminated by his former employer and that he has taken a wrongful dismissal claim against his former employer. If he so discloses, as he is obliged to do, he would not be able to find employment which is a commercial reality. Therefore, he will be put to suffer an extra burden though at the end of the day the Industrial Court may hold that he is wholly blameless. Learned counsel further pointed out that the preamble to the Act speaks of prevention and settlement of any differences or any dispute arising from the relationship between employers and workmen. This basically means maintaining industrial harmony. A workman who is forced by the mitigation principle to seek employment elsewhere may find himself in an awkward position when the Industrial Court orders reinstatement to his former position. He will be in a dilemma. If he does not report back to work with his former employer as ordered by the court, he may be deemed to have abandoned his job. He may be liable to the former employer for wages in lieu of notice. Conversely, if he leaves his employment and returns to his reinstated position, he will be held liable to his new employer for wages in lieu of notice. In either way, the imposition of mitigation principle impairs industrial harmony and induces breach of contract of employment. A court of equity and good conscience cannot afford to own this principle at the expense of industrial harmony. Lastly, learned counsel contended that the rule of mitigation, in every other respect, operates against a blameless workman and gives an unfair financial advantage to an employer whom the court subsequently finds to have wrongly dismissed the workman. Learned counsel for the first respondent, on the other hand, disagreed because such practice requiring mitigation has been adopted regularly by the Industrial Court.

A B C D E F G H

Having considered the matter, I am of the view that the principle of mitigation of damages as applicable in a claim in tort or contract would not be applicable in a statutory claim under the Act. The learned author, CP Mills in *Industrial Dispute Law in Malaysia* said at p 166: I

> In the damages cases, the common law accepts the position that the contract has been terminated by the dismissal, whether the dismissal be wrongful or not. The employee likewise must accept the fact that his contract has been

> brought to an end, and the court will do nothing to reinstate him. From his own point of view, as well as from the point of view of the law, his first need will be to seek other employment, while his right to recover damages from the employer, if the dismissal has been wrongful, will take care of the loss arising from the dismissal, including of course the loss of wages during the period he is out of work. In reinstatement proceedings, the man is claiming that, according to the principles of the Industrial Court, his dismissal was wrongful and that he is entitled to an order that will compel the employer to recognize the contract as still on foot and binding on both parties. It would be inconsistent for the workman, while still making this claim, to go off and seek other employment; to do so might suggest that he had abandoned the claim to be reinstated, and it would then be open to the employer to argue that there was no longer any trade dispute in existence.

Recognizing that the principle of mitigation does not apply in reinstatement cases, what then if in fact the dismissed workman during the period pending the adjudication of the status of his dismissal was working elsewhere and earning wages? Can that amount of wages earned be taken into consideration in determining back wages due to him from the employer who had wrongly dismissed him? Malhotra in *The Law of Industrial Disputes*, Vol II (4th Ed) at p 959 said:

> *The effect of reinstatement* is to restore an employee to his former capacity, status and emolument, as if his services had never been terminated and the employee gets the benefit of continuity of service. *In the absence of cogent reasons to the contrary, such compensation should normally be equal to the full wages or remuneration which the employee would have received had he continued in service but for the order of termination of his service.* (Emphasis added.)

Thus, there would have to be cogent reason before the dismissed workman in the circumstances can be denied his full back wages or that the quantum of his back wages be scaled down. Simply for the reason that during the idle period before the determination of his representations by the Industrial Court that he was employed elsewhere, in my view, cannot be cogent reason. He did that out of sheer necessity to maintain himself and those dependent on him for a livelihood. It is inequitable to require him to offset that amount which he earned in order to survive. His right to earn a living is equated to his right to a livelihood guaranteed by our Federal Constitution: see *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. The fault is not with him for not working with the employer who had been held to have wrongly dismissed him from his employment. In the instant case, it is also not the applicant's fault for having her representations determined late and for that reason it is inequitable to take away from her the income she earned elsewhere during the period in order to keep her alive on account of the fault of the first respondent. In any event, her income during her employment period outside was only RM600 per month as a finish artist compared to her income prior to her dismissal by the first respondent of RM1,500 per month as a draughtswoman cum estimator. In the circumstances, I would hold that the applicant is entitled to full back wages from the first respondent from the time of her dismissal on 15 March 1993 to the date the award was handed down by the second respondent on 23 January 1996 in relation to

the status of her dismissal by the first respondent. This would work to a total of two years ten months and eight days at the rate of RM1,500 per month, amounting to RM51,400.

In conclusion, I would therefore allow the application of the applicant and order that that part of the award dismissing the claim of the applicant for back wages be quashed and substituted therewith with an order for the first respondent to pay the applicant the sum of RM51,400 being the amount of back wages due to her over and above the amount of RM10,500 already awarded by the second respondent by way of compensation in lieu of reinstatement. Costs to be borne by the first respondent.

Application allowed.

Reported by K Tang-Wai